No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD,

Appellant,

—vs.—

AMERICAN PACKING &
PROVISION CO., a Corporation,

Appellee.

Brief for Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO,
EASTERN DIVISION.

NEIL R. OLMSTEAD
Ogden, Utah

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Attorneys for Appellee

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Since this appeal is predicated largely upon appellant's contentions that the findings of fact of the lower court are without support in the evidence, a brief resume of the evidence may be helpful. More detailed consideration will appear in the argument.

Prior to November 4, 1946, appellant approached appellee, through its livestock buyer Louis Salerno, in the matter of the purchase by Appellee of some steers (Record, 136). Following negotiations between the two, appellee's attorney prepared the contract that was received in evidence as Exhibit 1. On or about October 31, 1946, two copies of the contract were mailed by Mr. Salerno in Ogden, Utah, to the appellant at Irwin, Idaho. One copy had been signed by appellee's Vice-President and General Manager, E. W. Fallantine, on behalf of the appellee. (Record, 137). Accompanying the contracts so mailed was a letter from Mr. Salerno, which letter was received in evidence as Exhibit 13, and which letter was as follows:

"Oct. 31, 1946

Bert Ruud
Irwin, Idaho

Dear Sir:

Enclosed is contract on 300 steers. You will note that I have used 29.66 as the purchase price as this is the ultimate dressed weight cost on cattle that cost 17.50 alive and yield 59%.

If there is any part of this that you don't understand please call or write me and I will try and explain same.

If it is satisfactory please sign it and mail back, and we will send you a check for $3,000.00.

Yours truly,

/s/ LOUIS SALERNO."

On or about November 4th, 1946, appellant signed the contract and returned a copy so signed to appellee. The one he returned did not have Mr. Fallantine's signature thereon, as he *requested* that the same be signed in his accompanying letter. Accompanying the copy so returned to appellee was appellant's letter to appellee's agent, Mr. Salerno, dated November 3, 1946, received in evidence as Exhibit 2, and reading as follows:

"Irwin, Idaho
Nov. 3, 1946

Louie Salerno
Ogden, Utah

Dear Sir:

I am enclosing the contract signed but *would like* the place in paragraph four (4) where you recite that you will shrink the warm carcass 33% three per cent as this part of our verbal agreement was not agreed on and if this was allowed and me deliver the cattle to plant it would amount to roughly $10, per head and the yield would be lowered to cut the price also.

As I understand the price of 29.66 on a yield of 59 will also apply to a yield of higher or lower as we agreed on that is if the cattle yield 60 the price would raise according and if they yield 58 the price will lower the same way.

I will sign the contracts but kindly erase the 3% shrink on hot weight as this will cost me

roughly $6 per head and I think that I should be allowed hot weight when I deliver the cattle and guarantee 59 and A Grade and *I also have the best bunch of steers I ever fed. Have sorted all the rough ones and large off steers out have two bunches to receive but the snow storm delayed some but will get them soon.*

Kindly sign the Copy and mail check to me at Irwin when and if you can at once I may be at the Falls Wed. and you can hand it to me there *will be at Jackson with the cattle* until then.

Yours truly,

Bert Ruud
BERT RUUD /s/'' (*italics added*)

In the copies of the contract forwarded to appellant on October 31, 1946, the date was blank as well as the brand description of the steers covered by the contract. The brand description "O L Hip", (meaning O on left hip) was inserted in the contracts by the appellant at the time he signed them. He probably also inserted the date as November 4th, 1946, although he was a little uncertain as to this (Record, 20).

In his letter of November 3, 1946, which accompanied the contract signed and returned by defendant, defendant *requested* plaintiff to sign the copy he was returning. He also requested a modification of the contract as executed to eliminate the shrinkage provisions. He followed this up with a letter of November 12, 1946, received in evidence as Exhibit 14, in which he suggested the provision as to shrinkage be modified to reduce the percentage from 3% to 1½%, rather than com-

plete elimination, as suggested in his letter of November 3rd. The experience of the packing industry generally is that the shrinkage in weight in cooling is 3% (Record, 119).

Mr. Salerno on November 15, 1946, replied to appellant's letters advising in substance that the shrinkage provision could not be modified, (Exhibit 15). No other correspondence passed between the parties until the following August. These August letters will be referred to presently.

On or about November 29, 1946, Mr. Salerno left at the Rogers Hotel in Idaho Falls, Idaho, a draft payable to appellant in the amount of $3,000.00 (Exhibit 16). Appellant received the draft, cashed it in early December, 1946, and retained the proceeds of the same until the following September, and after demand had been made upon him for delivery under the contract, when he attempted, through his attorney, to repay the amount thereof (Exhibit 8). On the draft was a notation that it related to "240 or more" steers, and from this the court found the parties had mutually agreed to reduce the number of steers appellant was obligated to deliver from 300 to 240.

At the time the contract was signed, appellant, according to his testimony (Record, 141) had no cattle whatever on his ranch at Irwin, Idaho, which ranch is on the Wyoming line (Record, 20). However, according to his further testimony, he had all kinds of cattle across the line in Wyoming (Record, 144) including steers having had a paint brand O on their left hip, placed

thereon by appellant himself (Record, 147, 148), and which steers, appellant had stated, had been sold under contract for delivery the next year. They were of good quality, and appellant said he wanted to put as much gain on them as possible (Record, 47, 57, 61). The steers so branded would have weighed, under normal feeding conditions, 925 to 1000 lbs., in August and September, 1947. (Record, 51). Some of the steers so branded O on the left hip also had the °V° brand belonging to Bruce Porter of Jackson, Wyoming, and other brands registered in the names of a Mrs. Grismer, Wayne Ricks and others the witness could not recall. Subsequent testimony of the brand inspector John Smith developed that the Grismer brand was nnv, the Porter brand was °V° and the Ricks brand was $\frac{N}{N}$

On or about August 6, 1947, appellant sold at Idaho Falls, in the name of his son, Max Ruud, 9 head of the °V° steers (Bruce Porter brand) which 9 head had an average weight of 1,037 lbs. each, and for which he received an average price of 24.09 cents a lb. (From Exhibit 3). Appellee bought and paid for them (Exhibit 4). On September 10, 1947, he sold at Idaho Falls 149 head, which had an average weight of 1,037 lbs. each, and for which he received an average price of 25.85 cents a lb. (From Exhibit 5). On September 11, 1947, he sold at Idaho Falls 1 steer which weighed 845 lbs., at a price of 24 cents a lb. (From Exhibit 5, second page). On September 17, 1947, he sold at Idaho Falls 26 head which had an average weight of 1,108.6 lbs. each, and for which he received an average price of 25.38 cents a lb. (From Exhibit 6). The brands on the steers so sold on these

three dates were similar to those borne by the steers appellant owned at the time the contract was signed and which were then being fed by the witness Robertson, and which at that time bore the paint brand O on the left hip, being the brand described in the contract.

The sale of the 9 head at Idaho Falls, as appellant marketed them in the name of his son, Max Ruud, apparently invoked considerable comment as to whether appellant was disposing of the steers he had contracted to appellee. As no bill of sale from the former owner was presented, the brand inspector, J. J. Smith, refused to release the proceeds to appellant, and shortly thereafter the brand inspector had a conversation with appellant relative to the 9 head. In the course of the conversation appellant told the brand inspector in substance that the 9 head were not part of the steers he had contracted to appellee, but those steers were still on his ranch (Record 45).

Following the appearance of the 9 head on the Idaho Falls market, Mr. Salerno went to appellant's ranch to request delivery of the steers covered by the contract. Appellant said in substance that he didn't have them (Record 130, 188). A few days later Mr. Salerno went back again, with the same result. Appellant then, and under date of August 22, 1947, wrote appellee a letter (Exhibit 11) as follows:

"Irwin, Idaho

Aug 22, 47

American Packing and Provision Co.

Ogden, Utah

Attn: L. Salerno

With reference to our different talks on this cattle contract wish to submit the following *to try to fill the contract.*

Inasmuch as we did not get the cattle referred to in the contract I am willing to let you have *the cattle we have at the ranch* delivered at Ogden and weighed off Trucks at *19 cents per lb* and ship only what will grade A or better and you can grade there here or I will sort them as we ship them and you can start to take them any time now and string them out as you wish.

As I have explained to you these cattle stand me this much and *as the prices rose so fast after we made the deal* and so many cattle that I expected to fill this deal with went back on their deal and I did not get them as I explained to you when here, and therefor, I am willing to let you have these at cost or if you cannot use them at that I will put in other cattle by First of Oct and get rid of these.

You have never seen these steers yet *only in the 9 head that you purchased in Idaho Falls* that were my son's and the balance will *compare to them only they are getting better each day.*

Yours truly
Bert Ruud
BERT RUUD /s/" (*italics added*)

Appellee on August 26, 1947, replied to this letter by making formal written demand for delivery of the steers (Exhibit 7). On August 28, 1947, appellant wrote appellee (Exhibit 12) as follows:

"Irwin, Idaho
Aug 28 47

American Prov Packing Co.
Ogden

Referring to your letter of Aug 26, 1947, will say that I *have* no steers of the description set forth in contract and have explained why.

The steers I offered you in my letter of the 22nd will more than compensate you in that they will weigh twice as much per head will produce more beef and will be worth more to you than *the steers described in contract.*

I therefor offer these to you *in settlement of contract as set forth in letter of* 22*nd* as I would have been able to make money *had I filled the contract* as set forth but the cattle I offer are worth at least six cents per pound more than I offered them to you on the market.

Yours truly
Bert Ruud
BERT RUUD /s/" (*italics added*)

Thereafter, and under date of September 11, 1947, Mr. Albaugh, as attorney and agent for apppellant, wrote appellee (Exhibit 8) as follows:

"P. O. Box 428 Phone 326

RALPH L. ALBAUGH
Lawyer
201-205 Rogers Bldg.
Idaho Falls, Idaho

September 11, 1947

American Packing & Provision Co.

Ogden, Utah

Gentlemen:

Last November you gave your check to Bert Ruud for $3000.00 as an initial payment under a purported contract of sale for 300 head of steers.

I have advised Mr. Ruud to return this money to you, together with interest at the legal rate of 6% from the time he cashed your check. He informs me that he cashed your check in December, 1946, and we have included interest for nine months. Enclosed you will find Mr. Ruud's check for $3,135.00.

Very truly yours,

RALPH L. ALBAUGH /s/
Ralph L. Albaugh" (*italics added*)

The price to be paid for the steers covered by the contract was on a dressed weight basis of 29.66 cents per lb., for Grade A's, with adjustments up or down

for those that might grade higher or lower. This was computed upon a live weight price of 17.5 cents per lb. (Record 29), with a yield of 59%. It takes good quality steers to yield 59% (Record 116). By "percentage of yield" is meant the percentage dressed weight bears to live weight. To convert a live weight price of 17.5 cents per lb. into a dressed weight price on the basis of a 59% yield the mathematical formula is to divide the live weight price of 17.5 cents by 59, with the result of 29.66 cents. To convert from dressed weight to live weight on the same basis, you multiply the dressed weight price of 29.66 cents per lb. by 59%, with the result of 17.5 cents. (Record 116-118).

The market value of good quality slaughter steers at Ogden, Utah, during August and September, 1947, was 25 to 26 cents per lb. live weight (Record 87).

No steers were delivered under the contract (Record 116).

Appellant testified that in late September, 1947, he told Mr. Salerno he would go on the Denver market and buy 300 steers and deliver them to appellee at 17.5 cents per lb. (Record 158).

Salerno denied this and testified that the only offers ever made were embodied in the letters Exhibits 11 and 12, above set out in full (Record 139-140). By these letters appellant sought to settle his obligations under the contract by delivering an unspecified number of steers at a higher price than the contract obligated appellee to pay.

The trial court found the contract a valid and binding obligation, which appellant had breached by his failure to deliver. It found the market value of the steers at the time delivery should have been made at 25c per lb. live weight, as compared to the contract price of 17½c, and that appellee's damages was the difference. It found the weight of the steers at the time delivery should have been made at 950 pounds each. It found the contract, subsequent to its execution, to have been modified to reduce the number of steers appellant was obligated to deliver from 300 to 240. It concluded appellee's damages per undelivered steer to be 7½ cents multiplied by 950 (pounds), or $71.25, and granted judgment on the basis of 240 steers at $71.25, or a total of $17,100.00 damages. Judgment was also granted for the $3,000.00 down payment.

ARGUMENT

Threaded throughout appellant's entire argument is the complaint that the trial court found the facts contrary to his contentions, and that this court should review the evidence, find facts therefrom contrary to the lower court's findings, and thus reverse the lower court's decision.

That such is not the province of this court is fundamental. The findings of fact of the trial judge, based in part upon oral testimony, will be viewed in the same manner as would be a verdict of a jury, and those findings are to be accorded the same conclusiveness, weight and binding effect as a verdict of the jury. Findings of fact will not be disturbed on appeal unless they are

clearly contrary to, or plainly, flagrantly and indisputably against the evidence.

U. S. vs. Jefferson Electrical Mfg. Co., 291 U. S. 386, 78 L. ed. 859.

3 Am. Jur. 459.

We now consider appellant's several points seriatum, demonstrating that there is no reversible error in the record of this case.

I

Did the trial court err in denying appellant's offer of proof that the contract was conditionally delivered?

Appellant's contention is that delivery of the contract was based upon two conditions (a) that the provision therein contained for a 3% shrinkage be eliminated; (b) that it was agreed that the contract was not to take effect unless and until the appellant procured steers for the contract from other parties..

The trial court found against appellant on both these contentions—finding the contract was unconditionally delivered, and further finding that if any conditions were attached to the delivery, such conditions were waived by the appellant (Findings XV and XXI, Record 176-177).

That there was an actual manual delivery of the written contract is without dispute. That legal delivery was likewise effected, was established by the evidence.

The parties both signed the written agreement embodying mutual engagements, and copies thereof were received and retained by each.

The initial words of the contract are "This agreement, *made* this 4th day of November, 1946." The use of the word 'made' imports the completion of the contract. In the Idaho case of Ellwing v. Mullen, 38 Pac. 404, the Idaho Supreme Court held:

> "The term 'made and executed' as often used, means a completion of the transaction to which it refers, and when applied to a written instrument, imports, *not only the signing* and acknowledgment thereof, *but also a delivery of the same.*" (*italics added*).

More, however, than a mere importation or presumption of delivery is present in this case. Let us examine the evidence in the light of appellant's specific contentions:

(a) *As to the shrinkage provisions*: Appellant signed as his free, voluntary and solemn act the written contract as introduced in evidence. He returned the contract so signed by him to appellee by mail, accompanied by a letter (Exhibit 2, Record Page 27) requesting appellee to sign the contract and to mail or deliver him a check. True it is, that in the same letter he said he would *like* the shrinkage provision eliminated, and he requested the erasure of the shrinkage provision, but at no time did he assert, or even intimate, that the contract was conditioned upon its elimination. Rather it

is obvious that what he was seeking was a modification of the contract as made, and he was unsuccessful in obtaining consent to such modification. That the delivery was not conditioned upon elimination of the shrinkage provision is further evidenced by his letter of November 12, 1946. (Exhibit 14, Record, Page 133) in which he suggested the shrinkage be cut from 3% to 1½%. This suggestion was declined by appellee on November 15, 1946, (Exhibit 15, Record, Page 154). The matter was pursued no further, appellant thereafter accepted appellee's check for $3,000.00 and retained the proceeds thereof until after appellee learned he was marketing steers in his son's name, appellee had demanded delivery, and appellee had advised appellant that the matter would be referred to its attorneys (Exhibit 7).

From the foregoing evidence, the court found that delivery of the contract was not conditioned upon the elimination of the shrinkage provision, and we submit that the evidence is ample to support this finding.

(b) *As to the delivery being conditioned upon his getting the steers from others*: Appellant's contention in this regard is that the trial court precluded him from making proof that he did not, at the time of signing the contract, have the steers covered thereby, and this was a condition to its binding effect. What does the record show in this regard? It shows:

(1) At the time the offer of proof was made, the contract was in evidence, appellant having admitted its execution and manual delivery. In the contract he had

acknowledged having the specific steers covered thereby, and had himself inserted the brand description thereof, O on the left hip.

(2) His letter of November 3, 1946 (Exhibit 2) was in evidence, having been offered in evidence by appellant himself (Record, page 26). In this letter, in referring to the cattle covered by the contract, he described them as "the best bunch of steers I ever fed," and also stated that he had "two bunches yet to receive." It is to be noted that his assertion was that he had the two bunches "yet to receive," not to acquire title to. Also that he would "be with the cattle" until the following Wednesday.

(3) His former employee, Orland Robertson, had testified that at the very time the contract was signed, he himself, as appellant's employee, was caring for appellant's O left hip steers to the number of at least 218 head (Record, page 47-48).

(4) The brand inspector, Smith, had testified that in August, 1947, when checking with appellant about the 9 head that were sold, appellant had told him that the steers he had contracted to appellee were still on the ranch.

In other words, at the very time he signed the contract he had steers branded O on the left hip; he was then referring to them as the best steers he ever fed; and his employee, Orland Robertson, was then caring for them under appellant's direction. Further than that,

appellant himself described the steers covered in the contract, for when the contract was sent to him, the brand description of the steers was left blank, and appellant at the time of signing the contract himself inserted the brand description of the O left hip steers. In the light of this conclusive proof it is small wonder that Judge Healy was disinclined to permit appellant to testify that he did not at the time the contract was signed, have the O left hip steers covered by the contract. To do so would be to permit appellant to testify that the representation he himself embodied in the contract, namely, that he had the O left hip steers, was false and untrue, and also that his reference to the steers in his letter of November 3, 1946, as being the best bunch of steers he ever fed, and that he would be with them, was likewise false and untrue.

In view of these affirmative representations on the part of the appellant, evidenced by his own writings to the effect that he did have the specific steers covered by the contract, it is apparent that his then offer to prove by oral testimony that he did not have the steers was wholly sham and frivolous, and Judge Healy was entirely right in refusing to permit him to so testify. Further, such parol evidence would tend to vary the recitals in the written contract itself.

(c) *Condition precedent inconsistent with written contract*:

We concede without argument the general principle asserted by appellant in his brief to the effect that a

party to contract can prove by parol a condition precedent to the effectiveness of the contract. However, that rule is subject to the limitation that the condition precedent sought to be proved is not inconsistent with the writing itself. In other words, where the condition precedent is not inconsistent with the written provisions of the contract, the same may be proven by parol, *but not so where such condtion precedent is inconsistent with the written conditions of the contract.* The rule is thus stated in 32 CJS, page 859:

> "Where the alleged condition precedent is inconsistent with the written instrument parol evidence thereof is inadmissible."

And in Restatement of Law of Contracts, Section 241:

> "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative *if there is nothing in the writing inconsistent therewith."* (*Italics added*).

And in Hanrahan-Wilcox Corporation v. Jenison Machinery Co., (Calif.) 73 P. (2) 1241:

> "Lastly, plaintiff claims that the testimony does not come within the prohibition of the parol evidence rule because it does not change the terms of the written agreement but proves a condition precedent to its effectiveness. Testimony of the

> circumstances surrounding the execution and delivery of a written agreement ordinarily do not vary its terms and is therefore not within the parol evidence rule. Verzan v. McGregor, 23 Cal. 330; P. A. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411; Gleeson v. Dunn, 113 Cal. App. 347, 298 P. 119; Cooper v. Cooper, 3 Cal. App. 2d 154, 39 P. 2d 820. *However, if such testimony conflicts with the terms of the written agreement it falls under the ban of the rule.* (*Italics added*).

Here the condition precedent which appellant offered to prove was that he did not have the steers covered by the contract at the time the contract was signed, whereas the contract itself recited that he did have them. Thus, the condition precedent which he offered to prove is squarely within the limitations announced by the above authorities, and Judge Healy properly refused to receive the offer.

(d) *Contract provision result of appellant's mistake*:

Appellant further contends that the recital in the contract that he then owned the O left hip steers was a mistake and erroneous (See page 28 of Appellant's brief), and that he should have been permitted to show by parol what the true fact was. This is the identical situation that was involved in the case of Milner vs. Earl Fruit Co., 232 Pac. 581, wherein the Supreme Court of Idaho held as follows:

> The fact that the contract was signed and delivered at about dark, coupled with the further

fact, if it be true, that respondent did not read or understand the written contract, is not sufficient to set it aside and constituted nothing more than gross negligence upon the part of the appellant in failing to read the contract or have the same read to him, or to otherwise inform himself as to the nature, terms, and conditions thereof. Constantine v. McDonald, 25 Idaho 342, 137 P. 531; Price v. Shay, 110 Kan. 351, 203 P. 1105; 6 R. C. L. p. 624, § 43; 13 C. J. p. 370, § 249.

'The general rule of law that parol evidence cannot be admitted to alter, contradict, vary, add to, or detract from the terms of a written instrument or contract has so frequently been laid down in text-books, encyclopedias, and decided cases that no useful purpose would be served by incorporating at length the discussions contained therein.' ''

Also, Elliott on Contracts, Vol. 1, Page 192, as follows:

"Nor will one be relieved from the terms of a contract on the ground of mistake due to his negligence when it was within his power to have a stipulation inserted in the agreement which would have fully protected him. He is bound to assume any risk he might have provided against in the contract."

Further than that, appellant's letter of November 3, 1946 (Exhibit 2, Record 27), proved that the recital in the contract that he owned the O left hip steers was no mistake, for in this letter he specifically described

them as "the best bunch of steers he ever fed." In the light of this letter it is difficult to conceive his contention that he didn't have the steers covered by the contract, and his recital in the contract that he did was a mistake. Why, if he didn't have them, did he make the representations to appellee he did as embodied in Exhibit 2?

(e) *Error, if any, not reversible*:

Even though it be conceded, which we do not, that the lower court should have received appellant's proffered testimony that he did not have the steers at the time the contract was signed, still it would not constitute reversible error, because the excluded testimony would have but created a conflict in the evidence, conflicting as it did with his letter, Exhibit 2, and the other evidence, and it is apparent from the trial court's memorandum decision how such testimony, even though received, would have been considered in the light of the other evidence contradicting it. Judge Healy made this very plain in his memorandum decision, wherein he stated (Record, page 166):

> "In this and all other phases, I place no credence whatever in his (appellant's) testimony. Only in parts in which it is fully corroborated by other evidence do I regard it as worthy of belief."

It is apparent therefrom that the excluded testimony would not and could not have changed the trial court's belief as to the truth of the matter, and it is not re-

versible error to exclude evidence, even though properly admissible, where the effect thereof would not tend to change the final outcome.

The rule is thus stated in the case of Thatenhorst v. United States, 10 Cir., 119 F. 2d 567:

> "From the whole facts, we are of the opinion that the judgment of the trial court is not clearly erroneous, because it is supported by substantial testimony admitted in the record, and that the ruling of the trial court on the admission or the exclusion of testimony offered and admitted could not affect the final result which the court reached as a trier of the facts."

(f) *Waiver of conditions precedent*:

We have hereinabove demonstrated conclusively that the findings of the court to the effect that the contract was unconditionally delivered were in accord with the evidence, and that the court properly excluded appellant's offer to testify that he did not, at the time the contract was signed, have the steers referred to therein. We submit, however, that this question really becomes moot inasmuch as the court specifically found that even though a condition or conditions initially attached to the delivery of the contract, those conditions were subsequently waived by appellant.

This finding of waiver is amply supported by the evidence, as follows:

1. By appellant's acceptance and retention of the $3000.00.

2. By appellant's letter of August 22, 1947, after demand for delivery had been made in accordance with the contract, wherein he gave his reasons for non-delivery as being that he couldn't fulfill, not that there was no obligation to fulfill (Exhibit 11, Record, 121-122).

3. By appellant's letter of August 28, 1947 (Exhibit 12, Record, 123) in which he made an offer in *settlement of the contract;* never denying, until this action was brought, that the contract ever became effective.

A succinct statement of the law regarding waiver of conditions precedent to the taking effect of the contract is to be found in 17 C.J.S. 933:

> "Conditions precedent. As stated in Corpus Juris, which has been quoted and cited with approval by the courts, a party to a contract, who is entitled to demand performance of a condition precedent may waive the same, either expressly or by acts evidencing such intention; *and performance of a condition precedent to taking effect of the contract may be waived by the acts of the parties in treating the agreement as in effect.*" (*Italics supplied*).

Thus we say that regardless of any question of conditional delivery at the time the contract was entered into, the evidence conclusively established the appellant himself, by his subsequent conduct, waived any and all conditions he now claims were precedent to the contract's effectiveness, and the trial court's finding that any such conditions were waived, must be sustained.

Being satisfied by the evidence that any claimed condition precedent had subsequently been waived by appellant himself, the ruling of the court upon evidence relevant to such condition would not be reversible error, because the evidence is immaterial. The rule is thus stated in 5 C.J.S. page 1053:

> "Exclusion of evidence, although erroneous, is rendered immaterial by a finding on an issue which renders the exclusion of such evidence immaterial."

In Miller v. Estep (Tex.) 5 S. W. (2nd) 876, the court in considering an error predicated upon the exclusion of evidence held:

> "The conclusion necessarily follows that, even if the trial court erred in the particulars cited by plantiff, such errors did not cause a different judgment to be rendered to that which would have been rendered but for such alleged errors, and they therefore affirmatively appear to be harmless."

Thus it is in the instant case. The trial court having found that even though a condition initially attached to the delivery of the contract, such condition was waived by appellant, no prejudicial error could be predicated upon the exclusion of evidence relating to such condition, because, whether it did or did not initially attach, it would not operate to change the ultimate result.

II

If Appellant was required to deliver 240 steers, what would have been their weight and grade?

This is appellant's second point of argument, and we will answer the question embodied in the heading from the evidence itself. The court's finding is that the steers covered by the contract were "good quality steers" (Finding V, Record 174), and that the average weight thereof at the time delivery should have been made was 950 pounds each (Finding IX, Record 175). These findings were amply supported by the evidence.

Before reviewing the evidence itself, a review of the background may be helpful. Appellant contracted to deliver 300 steers branded O on left hip, and didn't deliver them. Appellant, by his own direct wrong in failing to deliver, made it impossible for appellant to prove the weight and quality at delivery time with the degree of certainty it would have liked. Now appellant says, in effect, "By my wrong I have made proof of exact weight and quality impossible; hence I cannot be held to answer for my wrong." Such, of course, is not the law, and appellee was and should be required to prove these facts only with such degree of certainty as the circumstances permit. Appellee, fortunately, was able to exceed appellant's expectations.

In appellee's pre-trial deposition (Exhibit 10) he testified that he did not use the O left hip brand at all in 1946. His testimony in this connection appears at page 26 of such deposition (Record, Page 108) as follows:

Q. Did you ever use that O Left Hip brand on any of your cattle?
A. Yes.
Q. And was that brand on any of those cattle that you had in the fall of Nineteen Forty-six?
A. No, sir.
Q. When had you used that brand before?
A. Oh, several different times.
Q. In Nineteen Forty-five?
A. Several years I have used it.
Q. Well, in Nineteen Forty-five?
A. I couldn't say for sure.
Q. In Nineteen Forty-four?
A. I might have.
Q. Well, do you have any recollection as to when you did use it before?
A. No.
Q. Except that you know that you have used it?
A. That's right.
Q. But you didn't use it in Nineteen Forty-six?
A. No, sir.

That this testimony was false was established by his employee, Orland Robertson, through whom it was established that from late October, 1946, until the forepart of December, 1946, (which was as late as Robertson could go, as he then left appellant's employ) appellant had steers which appellant himself had but recently marked with the O left hip brand. (Record, 46-49).

Appellant, himself, further proved the falsity of the testimony so given in his deposition. In his direct examination (Record 147) he told how he himself paint branded O on the left hip the steers Robertson took care of.

Thus it was, that while appellant denied in his deposition that he had any O left hip steers in 1946, appellant was able to prove that at the very time he signed the contract he had under feed steers so branded.

In the contract itself appellant represented that he owned the steers that were the subject of the contract; he himself inserting therein the description of the brand they bore, namely, O on left hip.

Further, in his letter of November 3, 1946, (Exhibit 2) he assured appellee that they were "the best bunch he ever fed"; that he had "sorted all the rough ones and large off steers out"; that he had "two bunches to receive * * * but will get them soon"; and that he would be "with the cattle" until the following Wednesday.

And so, despite appellee's covering, appellant was able to prove conclusively that at the time the contract was signed the steers that were the subject thereof were in existence, bore the O left hip brand, at least 218 head thereof then in appellant's possession, and the balance, if not then in his possession, soon to be received.

Thus, the existence of the O left hip steers which were the subject of the contract was conclusively and definitely established. However, it still remained for appellee to prove the quality of such steers, and their weight at the time they should have been delivered the following September.

As to this the trial court found they were of good quality, and would have weighed an average of 950

pounds at time of delivery. Appellant's contention is that there is insufficient evidence to support these findings, and no relevant facts were proven from which proper inferences of quality and weight might be drawn. That there was ample evidence to support these findings we will now show.

(a) *As to quality*:

(1) Appellant, according to his own testimony, had been engaged in the general ranching business for over thirty years, operating a thousand acre ranch near Irwin, Idaho (Record, 140). His operation consisted of buying, selling and feeding cattle for commercial purposes, and from time to time he had so handled cattle of all types (Record, 25). Under date of November 3, 1946, in returning the contract to appellee with directions to appellee to sign it, he described the steers that were the subject of the contract as being "the best bunch of steers I ever fed," with "all the rough ones and large off steers" sorted out (Exhibit 2, Record 27). When appellant himself, with the ranching record he had, described the steers as the best bunch he ever fed, with all the rough ones and large off steers sorted out, what possible inference can be drawn other than that they were top quality?

(2) Further in his pre-trial deposition (Exhibit 10, Record 110), in response to certain questions, appellant answered as follows:

> Q. What kind of cattle were you selling under the terms of this contract to the packing company?

A. The original deal, as we drew it up, would have been good cattle, had we completed the deal.

Q. Now, then, what do you mean by "good cattle," are you speaking of grade now?

A. No, I mean quality.

Q. A good quality of cattle?

A. That's right.

(3) Further, appellant's employee, Orland Robertson, who was caring for the O left hip steers at the time the contract was signed, and at the time appellant was representing them to appellee as "the best bunch of steers I ever fed" described these O left hip steers as being "good quality." (Record, 49).

(4) And finally, appellant, in his letter of November 12, 1946, (Exhibit 14, Record 113) spoke of the steers, which were the subject of the contract, as yielding 59%. E. W. Fallentine, Appellee's general manager, who processes thirty-four to thirty-six thousand head of cattle annually through appellee's plant, proved that the average dressed weight yield of good quality steers was 56 to 61 percent of the live weight (Record, 116), thus definitely placing the contract steers within the "good quality" class.

It is significant that appellant, in arguing in his brief that there was no evidence to support the trial court's finding that the steers which were the subject of this contract were of good quality, makes no mention whatever of any of this evidence. Nevertheless, it is all

in the record, and we submit it not only supports the finding, but removes any doubt whatever of the good quality of the steers.

(b) *As to weight at the time delivery should have been made.*

Certainly the contract is silent as to delivered weights the following fall, because this fact was of necessity unknown at the time the contract was made. Appellee is likewise mindful of its inability to prove this weight with exactitude, because it never received the steers. However, as in the case of quality, it was able to establish with reasonable certainty what that weight would have been had the steers been received.

(1) Appellant himself established the minimum weight, for in his deposition he stated the steers at the time of delivery to appellee would have weighed "about nine hundred pounds." (Exhibit 10, Record 113). That he underestimated this weight was proven by other evidence.

(2) The witness Robertson testified that the O left hip steers appellant had at the time this contract was signed would, under normal feeding conditions, have weighed 925 to 1,000 pouds by August and September, 1947 (Record, 51).

(3) The steers that Robertson, as appellant's employee, was caring for at the time the contract was signed, and which appellant had branded O on the left

hip, also bore original permanent brand markings of former owners from whom appellant had obtained the steers, namely, Mrs. Grismer, Bruce Porter, Wayne Ricks, and ranches in the Pinedale Country (Record, 48). The O left hip brand appellant placed on the steers was not a permanent brand, but one which would lose itself over a period of months (Record 52, 147). However, in August and September, 1947, which were the months during which delivery should have been made to appellee under the contract, appellant sold on the Idaho Falls market steers bearing permanent brand markings of steers formerly owned by Mrs. Grismer, Bruce Porter, Wayne Ricks, and other ranchers from the Pinedale country. It does not appear that appellant, from the fall of 1946 through the summer of 1947, owned any steers formerly belonging to those several ranchers other than the ones Robertson was caring for and upon which appellant had placed the O left hip brand. Thus it becomes apparent that the steers appellant marketed at Idaho Falls in August and September, 1947, were the O left hip steers he owned at the time he made the contract and were the same steers covered thereby. The detail of the marketing of these steers is shown by Exhibits 3, 5 and 6 (Record 41 and 67, 68) and reflect the average weight of the steers as being 1046 pounds.

The evidence as a whole, accordingly, well supports the finding of the trial court of an average weight of 950 pounds, and appellant's contention that the finding is without support in the evidence is not well taken.

One further comment in connection with the identity of the steers which were the subject of the contract

may not be amiss. The evidence shows they were O left hip steers, and also shows that at the time the contract was signed appellant owned O left hip steers having himself but shortly prior thereto so branded them. The evidence further shows that the steers which were the subject of the contract were specifically described by appellant as the "best bunch of steers" he ever fed.

Appellant suggests, however, that in so referring to the subject of the contract he might have been referring to the Peterson steers at Jackson, Montana. How this could be, when the Peterson steers were neither branded O on left hip, nor being fed by appellant, he does not suggest. Also he doesn't point out that the O left hip steers he then was feeding were at Jackson, Wyoming, but a few miles across the line from his ranch, and this is the Jackson he obviously was referring to.

The difference between this case and the case of Mason v. Ruffin (La.) 130 So. 843, wherein the court found evidence insufficient to support a finding as to the weight of undelivered cattle is that in the Ruffin case no particular steers were identified as the subject of the contract, whereas in the instant case the subject of the contract was proven to be the O left hip steers appellant had when the contract was signed. It wasn't a case of proving the weight of unidentified steers, but of proving the weight of definitely identified steers, which appellee was able to do, and did.

III

Did the trial court err in holding that the parties merely modified the original contract, and what was the effect of any change or modification?

The trial court found in effect that subsequent to the execution of the contract it was modified to the extent of decreasing the number of steers covered thereby from 300 head to 240 head, and, except as so modified, was at all times in full force and effect (Findings IV, XIV, XVII and XVIII, Record 174, 175).

Appellant's argument under this heading is a little difficult for us to rationalize, but apparently he contends, first, there was no evidence to support a finding of modification, and the trial court should have found complete abandonment, and, second, having found modification, appellant ipso facto could not recover because it had sued upon the original contract, rather than upon the original contract as modified in accordance with the trial court's findings.

(a) *Appellant's contention that the trial court erred in failing to find from the evidence that the contract was abandoned.*

At the outset it should be noted that the issue of abandonment entered this case by virtue of Paragraph IV of appellant's amended answer, reading as follows (Record, 10):

"Further answering said complaint and by way of further defense thereto:

"Defendant denies that plaintiff has performed the conditions, stipulations and agreements of said alleged contract on plaintiff's part to be performed, and in particular, defendant alleges that the plaintiff failed and refused to pay the $3,000.00 mentioned and described in said alleged contract as having been paid at the time of the execution thereof, and, by reason of such failure on the part of plaintiff to pay such sum or any part thereof, there was a failure of consideration for said alleged contract and the same was rescinded and abandoned by the parties, and became, was, and is null and void."

By Paragraph V of the amended answer appellant pleaded a subsequent new parol agreement, but did not plead thereby abandonment of the original contract. Thus the only issue, insofar as abandonment is concerned, is that raised by Paragraph IV. What is that issue? It is simply that by reason of appellee's failure to pay the $3,000.00 there was a failure of consideration and the contract was rescinded and abandoned.

Thus it is apparent, that the issue, while embodying the word "abandoned," was really one of rescission for failure of consideration. Legal principles involved in the matter of rescission differ greatly from those involved in abandonment, the former requiring notice of rescission and restoration of statu quo, not necessary in the case of abandonment. Rescission is a method whereby one party to a contract may, under certain circum-

stances, relieve himself of his obligation; abandonment must be mutual.

But regardless of what it may be called, the issue was that appellant was entitled to be relieved from responding in damages for his failure to deliver under the contract, because appellant had not paid him the $3,000.00 down payment, and both parties mutually agreed that the contract should be held for naught. The matter of the payment of the $3,000.00 will be more fully discussed in our answer to Point VI of appellant's argument, wherein the question is directly involved, and for present purposes we pursue it from the standpoint that on the question of rescission or abandonment it is immaterial.

The agreement of the parties obviously was that an initial payment in the amount of $3,000.00 would be made by appellee to appellant on the purchase price of the steers, with the balance to be paid after delivery. The contract was prepared in Ogden, where appellee had its principal office. Appellant was in Idaho. Had an agent of appellee's personally taken the contract to appellant in Idaho, the $3,000.00 might have been paid, as the agreement contemplated, to appellant at the time he signed the contract. However, instead of such personal delivery, the contract was mailed to him on October 31, 1946, with the advice (Exhibit 13) that the

check would be mailed upon his execution and return of the contract. There is nothing unusual in that.

True, upon receipt of the contract without the $3,000.00 appellant might properly have refused to sign it. This, however, he did not do, but on the contrary he signed the contract and returned it *with the request that the check be mailed to him* (Exhibit 2, Record 27). Thus, whatever right he had to insist on payment at the time of signing was waived by him. He was, we concede, thereafter entitled to receive it within a reasonable time, unless he likewise waived that right, or to rescind, and failure to rescind within a reasonable time after the right accrues constitutes a waiver of such right.

On November 12, 1946, appellant wrote appellee (Exhibit 14, Record 133), but nothing about the $3,000.00 was said, nor any objection with respect thereto raised. Nor was any question about the $3,000.00 raised until March 22, 1948, when appellant first raised it at the time of the first trial in this cause. In the meantime, and on or about November 29, 1946, appellant received $3,000.00 from appellee, which he retained until September 11, 1947, or a period of nine months.

We submit, accordingly, that if defendant didn't get the $3,000.00 as an initial payment on the contract, he waived any remedy he had with respect thereto (other, of course, than to receive it at the time the balance of the purcase price was paid) by failing to rescind. If he did get the $3,000.00 on or about November 29, 1946, and that he then did receive $3,000.00 from ap-

pellee is without dispute, by accepting and retaining it, he waived any complaint he might have had for appellee's failure to give it to him earlier.

So much for rescission. Now what about mutual abandonment, assuming it was properly raised as an issue.

Appellant's contention here is, that as he testified that the parties, shortly subsequent to the execution of the contract, mutually abandoned the written agreement, and as this testimony was uncontradicted, the court was bound to find abandonment, and it was error to find otherwise.

We concede the rule to be as pointed out by the Idaho Supreme Court in the case of Pierstorff v. Grays Auto Shop, 58 Idaho 438, 74 P. (2d) 171, cited by appellant, that the uncontradicted testimony of a "credible witness" should be accepted. Such rule has no application to appellant's testimony, however, first, because the court found, and made no bones about it, that appellant was not a credible witness, and, second, because this testimony was not uncontradicted.

As to appellant's credibility as a witness, Judge Healy thus found:

> "In this and all other phases I place no credence whatever in his testimony." (Record 166.)

We cannot, of course, detail all of the circumstances that entered into Judge Healy's determination that ap-

pellant was unworthy of belief, but he certainly felt justified in his conclusion. Undoubtedly the following factors were impressive:

First, his denial in his pretrial deposition that he used the O left hip brand at all in 1946, (Exhibit, 10, Record 108) when the evidence conclusively established that at the very time the contract was signed he had O left hip steers, and had himself so branded them.

Second, his pleaded defense that he was unable to get the steers covered by the contract, in the light of appellee's proof that he actually had at least most of them, was receiving others, and his admitted reason in his deposition for not getting others was because he was "stalling." (Record 114). Also his statement to the brand inspector, Smith, that the steers contracted to appellee were on his ranch (Record 45).

Third, his contradictory denials and assertions in his amended answer as compared with his original answer as amended.

Fourth, his protestations of offers to perform in August, 1947, in the light of his letters of August 22nd and August 28, 1947, (Exhibit 11, Record 121, Exhibit 12) establishing that what he was attempting to do was to force appellee to pay more than the contract price.

Other circumstances undoubtedly influenced Judge Healy in discounting as he did the credibility of appellant, and the cold record, without regard to appellant's

demeanor and appearance on the witness stand, amply supports his conclusion.

As to appellant's contention that his testimony of abandonment was uncontradicted.

Here the record itself again provides the complete answer.

First, appellant accepted and retained, until after the delivery dates, appellee's check given as the down payment under the contract. True, he now contends the $3,000.00 was paid under some other contract for some other steers, but when the money was attempted to be returned the following September it was accompanied by a letter acknowledging it was paid under *this contract*. More about this later.

Second, on August 22, 1947, (delivery time under the contract) appellant wrote appellee submitting a proposition "to try to fill the contract" (Exhibit 11, Record 121). What better proof that appellant then considered the contract an outstanding obligation, not an abandoned nullity?

Third, on August 28, 1947, appellant again wrote appellee saying "I therefore offer these to you in settlement of contract" (Exhiibt 12). Again recognizing the then existence of the contract.

Fourth, appellee's repeated demands upon appellant for delivery of the steers, thus negativing any possible inference that appellee considered the contract as having been abandoned (Exhibit 7, Record 84, 130, 138, 139).

We submit, accordingly, that appellee's testimony of mutual abandonment not only is not uncontradicted, but on the contrary the evidence, including appellant's own admissions in his letters of August 22 and August 28, conclusively establishes the parties themselves never considered the contract abandoned.

(b) *The trial court having found that the contract was modified to the extent of reducing the number of steers appellant was obligated to deliver, what is its effect on appellee's right of recovery.*

Appellant's argument here is that inasmuch as he, as a matter of defense, was successful in establishing that the written contract was subsequently modified to reduce the number of steers appellant was obligated to deliver from 300 to 240, and appellee had sued to recover damages on the basis of 300, appellee was entitled to recover nothing whatever, despite the fact that appellant didn't deliver the 240 head, or any part thereof; and particularly no recovery can be had, because of appellee's failure to amend its complaint to conform to the proof.

He then cites a number of authorities to the effect that where an action is based on one contract, and proof is made of another or modified contract, no recovery may be allowed. What he neglects to point out is that here the finding of modification is based on *appellant's evidence,* not appellee's, and under such circumstances the rule has no application.

The correct statement of the rule applied in the cases cited by appellant is as set out in 17 C.J.S. Page 1215, under the title "Contracts" as follows:

> "If plaintiff declares on a contract as originally made, and *his* evidence reveals that the original contract has been superseded or materially modified by a subsequent agreement, the variance will be fatal to recovery."

In other words, if the plaintiff's evidence does not conform to his pleadings, he may not recover, absent an amendment of his pleadings to conform to the proof. That this archaic rule no longer applies in federal procedure we shall presently show, but, regardless of that, it has no application here, because it wasn't appellee's evidence that was at variance with his pleadings, but appellant's evidence that was at variance with appellee's pleadings, as is natural to assume it would be.

The trial court's findings of modification of the written contract to the extent of reducing the number of steers covered thereby from 300 to 240 head is based solely upon the $3,000.00 draft given by appellee to appellant, and upon which was the notation "240 or more" steers. (Trial Court's Memorandum Opinion, Record 167). This $3,000.00 draft was received in evidence as Exhibit 16, and as a part of appellant's defense, appellant himself testifiying in his own behalf at the time. His counsel, Mr. Albaugh, offered the exhibit in evidence (Record 149).

Hence, it was appellant himself who proved the modification, not appellee; yet apptllant suggests ap-

pellee must amend its complaint to conform to appellant's proof!

Another reason, however, why this point of appellant's argument is not well taken is that the so-called variance rule is no longer regarded under federal procedure, and even though appellee had given the evidence supporting the finding of modification, it would not affect the judgment rendered on the contract as modified. Bearing in mind that no issue of modification of the original contract was raised by the pleadings (the issue being that the original contract was rescinded or abandoned) Rule 15(b) of the Federal Rules of Civil Procedure become pertinent:

> "(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.*" (*Italics added*).

Hansen v. Creedon, 8 Cir., 163 F. (2) 223; Globe Liquor Co. v. San Roman, 7 Cir., 160 F. (2) 800; Aetna Casualty & Surety Co. v. Rhine, 5 Cir., 152 F. (2) 368.

IV

Did the trial court err in refusing to permit appellant to impeach the witness Salerno?

Under this point of argument appellant persists, as in other parts of his brief, in indulging the assumption that the steers, which were the subject of the contract, were never identified, and that it should have called Mr. Salerno to establish this identity. This assumption of failure by appellee to identify the steers that were covered by the contract is not well taken, because appellant himself, *the owner and seller of the steers, identified them.*

In the preliminary negotiations appellant agreed to acquire steers for resale to appellee under the contract. How those steers would be identified appellee did not know, so when the contract was forwarded to appellant the identification of the steers was left for appellant to insert in the blank space provided therefor. This appellant did by inserting in the contract before he signed it the identification of the steers covered thereby, namely, steers branded O on the left hip. At that time he had steers branded O on the left hip, having himself so branded them, and he returned the contract to appellee, completed as to brand description of the steers, directing appellee to sign it (Exhibits 1 and 2, Record 21, 27, 28). Thus, as the trial court found, appellant's O left hip steers, by appellant's own acts, became appropriated to the contract.

These O left hip steers were still further identified as then being herded by appellant's employee Robertson (Record 47); as being long yearlings (Record 49); as being White and Brockle faced (Record 59); as then

weighing from 625 to 750 pounds each (Record 48). Finally, appellant himself told Robertson that these particular White and Brockle faced, long yearling steers, were under contract to be delivered the following fall (Record 47, 55).

Accordingly, we submit the steers covered by this contract were amply and positively identified, and there was no occasion for appellee to call Salerno, or any further witnesses, for this purpose, nor, as appellee viewed it, for any other purpose. He was, however, in court throughout the trial, available by either side as a witness, and appellant elected to call him to testify as his witness (Record, 126). Appellant categorically asserts he was a hostile witness (Appellant's brief, Page 75), though there was no outward evidence of hostility. The trial court, apparently because he was in the employ of appellee, agreed that appellant might ask leading questions (Record, 126). After some preliminary questions appellant asked (Record, 129):

> Q. When was he to bring them to the ranch?
>
> A. There was no specific time when he was to bring them to the ranch.

Appellant then sought to impeach the witness by proving that in his pretrial deposition the witness had stated that appellant *told him* he would "bring them to the ranch in the spring." Upon objection, the trial court stated that he would not permit appellant to impeach the witness unless he brought "the witness within the rule" (Record, 129).

Now, what is the rule? Obviously, the rule relating to impeachment of witnesses! Certainly it is not the rule cited by appellant relating to the use of depositions, because that was not involved. The question was not whether the deposition could be used for impeachment purposes, but whether the witness might be impeached. When, and under what circumstances this witness may be impeached is a matter not subject to express federal rule as such, as the witness was neither an officer, director, or managing agent of appellee, but a matter nevertheless governed by established legal principles.

Rule 43 (b), Federal Rules of Civil Procedure, provides:

> "(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

The court permitted leading questions, but not impeachment at that stage, holding the witness must first be brought within the rule governing impeachment. As the witness clearly was not within Rule 43 (b), being neither an officer, director, or managing agent of appellee,

the right to impeach was governed by principles governing impeachment of one's own witnesses generally. Briefly, those principles involve hostility, surprise, and materiality and prejudicial character of testimony. Passing hostility and surprise, let's consider Salerno's testimony from the standpoint of its materiality and prejudicial character.

Salerno had testified that at the time of the preliminary negotiations he knew appellant did not have the steers he proposed to resell to appellee, but he was going to get them, and he assumed that by the time the contract was signed he had acquired them (as he actually had as shown by the other evidence). He was then asked (Record 129):

> Q. When was he to bring them to the ranch?
> A. There was no specific time when he was to bring them to the ranch.

It was on this answer that appellant sought to impeach him, by showing that in response to a question asked in his pretrial deposition he answered as follows (Record 129):

> Q. I believe you just stated it was your understanding that he was to winter them in Wyoming and bring them to his ranch in the spring?
>
> A. That is what Mr. Ruud told me; yes sir.

We submit that it was wholly immaterial whether, in the preliminary negotiations, "no specific time" was

agreed upon when the steers then being considered would be brought to appellant's ranch, or whether appellant told the witness he would bring them in the spring. In other words, it was an attempt to impeach on a wholly immaterial matter.

Neither was it, nor is it, apparent how the inconsistency could in any wise prejudice appellant's case. This was all involved in preliminary negotiations and discussions, with a subsequent written agreement entered into. The attempted impeachment, accordingly, was on neither a material or prejudicial matter, and no error occurred in the refusal to permit impeachment thereon.

There is, however, another and equally fundamental reason why impeachment of the witness in the manner sought was improper. Bearing in mind that the witness, albeit hostile, was appellant's witness, the rule is that impeachment under such circumstances is permissable only for the purpose of negativing or neutralizing his adverse testimony, not for the purpose of getting prior inconsistent statements before the court as affirmative substantive evidence. Here the purpose of the attempted impeachment was, as appellant himself states in his brief, page 75,

> "to impeach him through his pretrial deposition and compel him to divulge the facts."

In other words, the purpose was to *discredit him, and then get the facts from him as a discredited witness.*

It is, therefore, obvious that what appellant wanted was unlimited right of cross examination of the witness,

not impeachment, and no error is predicated upon any limitation placed by the court upon the scope of appellant's examination of the witness.

That the trial court's ruling on the impeachment of the witness was not error becomes clear when it is viewed, as it must be, from the standpoint that the only legitimate purpose of impeachment is to negative or neutralize adverse testimony of the witness sought to be impeached, and all of Salerno's testimony might be eliminated from this record without affecting in any way the evidence supporting the judgment. His testimony was all as appellant's witness, and its complete and total neutralization would adversely affect only the defense.

In Young v. United States, 5 Cir., 97 F. 2d 200, the rule is stated:

> "Neither, even where there is real surprise, is it proper to permit the impeachment to go beyond the only purpose for which it is admissable, the removal of the damage the surprise has caused."

V

Did respondent suffer any damage, and if so, are the same recoverable under the evidence in this case?

The contract here involved provided for a basic price of 29.66 cents a pound dressed weight for grade A steers. It further provided that for steers that graded higher appellee would pay a proportionately higher price, and for those that graded less a proportionately lower price. Quality was not mentioned in the contract

for the reason that the purchase price was fixed on a grade basis. However, good quality steers were appropriated by appellant to the contract as found by the court and supported by the evidence. The basic contract price of 29.66 cents dressed weight, when converted into live weight on a 59% yield factor, results in a live weight price of 17½ cents per pound, as pointed out by appellant at page 78 of his brief. Grade is determinable only after slaughter, quality is determinable before.

The evidence shows that the market price for good quality steers at the time delivery should have been made was 25 to 26 cents a pound live weight (Record 87). The court found the lesser price of 25 cents. The basic contract price was 17½ cents live weight (Record 29). Hence the measure of appellee's damages becomes the difference, or 7½ cents a pound.

But, says appellant, this is true only as to the steers that Grade "A," and we might have delivered you a lower grade on which the market was less than 25 cents, and hence your damages would have been less. The fallacy in this lies in not giving due regard to the contract formula, because, if lower grades were delivered, carrying with them a lower market value, appellee, under the contract, would pay for them, not on the basis of 17½ cents a pound, but at a proportionately lower price. Thus the spread between contract price and market value for low grade steers would be the same as for the higher grade. If appellant was to get 17½ cents regardless of grade his point might be well taken, but such was not the case. For lower grades he received less money, and the

establishment of the difference between contract price and market value as to one type of steer at 7½ cents automatically fixed the measure of damages per pound for all steers, regardless of type. This pricing formula is embodied in the contract, and no independent evidence thereof was necessary. Having the formula, and having the measure of damages, namely 7½ cents per pound, the only factor lacking for a determination of total damages is that of weight of the steers appellee should have received and didn't.

The question of weight has already been discussed, and the evidence amply supports the finding of 950 pounds per animal. As a matter of fact it supported a possible finding of much greater weight, so appellant shouldn't be heard to complain of the court's finding of the lesser. This evidence showed that appellant owned O left hip steers; it showed these steers were good quality; it showed their weight at the time the contract was made as being from 625 to 750 pounds each; appellant himself fixed a weight of 900 pounds at time of delivery; other evidence fixed an average weight of nearly 1,050 pounds. The finding of the court of an average weight of 950 pounds was well within the evidence, and we submit that appellant's contention that it is founded purely on guess work and speculation is not well taken.

Appellant's other point under this phase of his argument is that appellant offered to perform, and appellee refused. He testified that he *orally* told Salerno he would go on the market and buy steers to fill the contract and that this testimony was uncontradicted. He

also comments upon the asserted failure of Mr. Salerno to deny the testimony of this offer. Not only was this testimony contradicted, but the record shows that it was categorically denied by the other purported party to the conversation, Mr. Salerno. Near the conclusion of Mr. Salerno's cross-examination he was asked and answered as follows (Record 139):

> Q. In any conversations you had with Mr. Ruud or any dealings with Mr. Ruud during August or September, 1947, was any offer made by Mr. Ruud to deliver cattle other than embodied in the letters sent?
>
> A. He offered to deliver what cattle he had on the ranch for more money if we cancelled the contract.
>
> Q. Was any offer made other than stated in your answer?
>
> A. No sir.

In addition to the direct denial of the conversation, further doubt is cast on it by the circumstances under which it was purportedly held. Appellant says it was held the "last part of September" (Record 160). This was not only after he had refused delivery, but after he had retained counsel to defend him and to return the $3,000.00 (Exhibit 8).

Now as to the so-called offers by mail. Two letters were written by him, dated respectively August 22, 1947, and August 28, 1947 (Exhibits 11 and 12). In the letter of August 22nd appellant said:

> "I am willing to let you have the cattle we have at the ranch delivered to Ogden and weighed off trucks at 19 cents per pound."

Certainly, this is no offer to fulfill the contract, but rather an offer to deliver some cattle if appellee would pay more than the contract.

In the letter of August 28 appellant said:

> "I therefor offer these to you in settlement of the contract as set forth in letter of 22nd."

Again this isn't an offer to fulfill or partially fulfill, but an offer to deliver if appellee would pay a higher price, and also give appellant a full and complete release of his obligations under the contract.

In the light of all this it is difficult to understand appellant's assertion that the evidence establishes that he offered to do everything the contract obligated him to do. Our view of the evidence, shared by the trial court, is that he never performed, or offered to perform, in a single particular.

VI

Did respondent fully perform the terms of the contract on its part to be performed?

The only contention here argued is that appellant failed to pay the $3,000.00 down payment, and hence a complete failure of consideration. He here asserts that the only payment which was ever made by appellant was shown by the uncontradicted evidence not to have been paid on this contract.

The uncontradicted evidence he refers to is, of course, his own unsupported testimony. But even this testimony is contradicted by documentary evidence.

The issue is raised by Paragraph V of appellant's amended answer (Record 10), reading as follows:

> "Further answering said complaint and as a further defense thereto:
>
> "Defendant alleges that after it became apparent that said cattle could not be obtained which defendant and plaintiff contemplated that defendant would purchase at the time said alleged contract was signed, and on or about the *8th day of December, 1946,* the parties hereto entered into a new parol agreement under which plaintiff advanced to defendant the sum of $3,000.00 to assist defendant in purchasing other cattle to be fed by defendant and sold and delivered to the plaintiff in the fall of the year 1947; that defendant was unable to purchase cattle which would comply with the terms of said parol agreement and on or about the 11th day of September, 1947, defendant offered to return said $3,000.00 to plaintiff with interest at the rate of six percent per annum, amounting to the sum of $3,135.00, and defendant at all times since has been, and now is able, ready and willing to repay said amount to the plaintiff but that plaintiff refused, and still refuses to accept the same."

It will be recalled that in late November, 1946, appellant received appellee's check for $3,000.00. The proceeds of this check he retained until September of the following year and subsequent to the time he was called upon for delivery under the contract. Then under date

of September 11, 1947, through his attorney, he attempted to repay the $3,000.00 with interest, forwarding appellee a check accompanied by a letter. The letter does not appear to be set out in the Transcript of Record, but it was received in evidence as Exhibit 8, as follows:

> "American Packing & Provision Co.,
> Ogden,
> Utah.
> Gentlemen:
>
> *Last November* you gave your check to Bert Ruud for $3,000 as an initial payment under a purported contract of sale for 300 head of steers.
>
> I have advised Mr. Ruud to return this money to you, together with interest at the legal rate of 6% from the time he cashed your check. He informs me that he cashed your check in December, 1946, and we have included interest for nine months. Enclosed you will find Mr. Ruud's check for $3,135.00.
>
> Very truly yours,
>
> RALPH L. ALBAUGH /s/
> Ralph L. Albaugh."

This we say is conclusive proof that the $3,000 was paid under this November contract, and not under any subsequent December contract as pleaded, and appellant by such letter so acknowledged it to have been paid under this contract.

More, however, appellee refused to accept the check tendered by appellant, returning it by letter on October 14, 1947, received in evidence as Exhiibt 9, as follows:

"Mr. Ralph L. Albaugh
Attorney for Bert Ruud
Idaho Falls, Idaho

Dear Sir:

We are enclosing herewith check payable to American Provision and Packing Company in the amount of $3,135.00, executed by Bert Ruud, which was received from you in your letter of September 11, 1947, addressed to the American Packing and Provision Company.
By the return of this check we do not intend to waive and do not waive any right to the amount represented thereby and contemplate an action to recover not only the amount evidenced by this check, and all other General Damages for breach of that certain contract entered into the 4th day of November, 1946, between Bert Ruud of Irwin, Idaho, and the American Packing and Provision Company of Ogden, Utah.

Yours very truly,

O. R. BAUM, Attorney
for American Packing
and Provision Company"

Thus not only was the $3,000.00 attempted to be returned by appellant acknowledged by him to have been paid under the November contract, but likewise when it was returned by appellee to appellant it was recognized as being the $3,000.00 paid under the contract in issue.

Yet appellant asserts in his brief that the evidence was uncontradicted that the $3000.00 paid in November, 1946, was paid under a subsequent contract, which by his pleadings, was not even in existence at the time the

money admittedly was paid.

Be that as it may, however, the point is not crucial, for non-payment of the $3,000.00 would at most but give him a right to rescind, which right he never exercised. On the other hand, as we have previously pointed out, he at all times considered the contract as effective. At the risk of some repetition we refer to his letter of August 22, 1947, (Exhibit 11):

> "With reference to our different talks on this contract wish to submit the following *to try to fill the contract.*"

Also his letter of August 28, 1947, (Exhibit 12):

> "I therefor offer these to you in settlement of contract * * * ."

Obviously, if he didn't get the initial down payment (the evidence to the contrary), his subsequent conduct in recognizing the contract as a subsisting agreement constitutes a waiver with respect thereto, and he cannot now be heard to say that the agreement was void ab initio.

VII

Did the trial court err in denying appellant's motion to dismiss at the close of respondent's case?

The factors here involved go to the sufficiency of appellee's evidence to make out a prime facie case of recovery. Briefly this evidence showed:

a. The execution and delivery of the contract.

b. That the delivery was unconditional and was at all times recognized by both parties as be-

ing in full force and effect, as evidenced by:

1. Appellee's demands for delivery.

2. Appellant's letters of August 22nd and 28th, 1947, in which denial of the existence of the contract was not asserted, but on the contrary appellant suggested means "to fill the contract," and "in settlement of the contract." (Exhibits 11 and 12, Record 121 and 123).

3. The presumption of legal delivery arising under Idaho law (Ellwing v. Muellen, supra) from use of the language "made and executed."

c. Appellees performance under the contract. In appellee's complaint, it is alleged that it had done and performed everything on its part to be performed. That this is proper pleading in the Federal courts is settled by Rule 9 (c) of the Federal Rules of Civil Procedure. Appellant's answer thereto (Paragraph IV of amended answer) is to deny appellee's performance generally, and affirmatively allege appellee failed to pay the $3,000.00 mentioned in the contract, and therefore there was a failure of consideration.

The general denial of performance is insufficient to raise any issue. (Rule 9 (c) supra. Coral Gables, Inc. v. Skehan, 47 F. Supp. 1.) However, assuming the issues of performance were properly raised, adequate proof of performance was made.

Under the contract appellee's direct obligations were as follows:

1. To pay the purchase price for the steers after they were delivered and slaughtered.
2. Request delivery of the steers during the months of August or September, 1947.

No other direct obligation on the part of the appellee is to be found within the written contract As to the first, delivery was never made, so duty to pay for them never arose. Demand for delivery was duly made. (Exhibit 7).

But appellant asserts there was a failure of consideration in that the $3,000.00 was never paid. Proof of consideration was not a part of appellee's affirmative case. Here there was a written instrument, and under the Idaho law, *Section 28-103 I.C.A.*

> "A written instrument is presumptive evidence of consideration."
> *Also Section 28-104, I.C.A.*
> "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

Also Rule 8 (c) of Federal Rules, declaring failure of consideration to be an affirmative defense.

Still further it was affirmatively shown, as noted above, that the parties themselves at all times regarded the contract as of full force and effect.

And, finally, it was affirmatively shown that appellant, as late as nine months after he received $3,000.00 from appellee, acknowledged that the $3,000.00 was re-

ceived under this contract; for in his attempted return of the money, long after he had failed to make delivery, he referred to the $3,000.00 he had received as "an initial payment under a purported contract of sale for 300 head of steers." (Exhibit 8). Even appellant does not contend there was any other contract, purported or otherwise, for 300 steers.

d. Appellant's breach. Demand for delivery and non-delivery by appellant was conclusively established (Exhiibt 7, Record 84; Record 116).

e. Resulting damages. The steers covered by the contract were identified by appellant himself by this insertion of the brand description in the contract, namely, O left hip steers. His O left hip steers were specifically identified as being White and Brockle faced (Record 59); as being long yearlings (Record 49); as being herded by appellant's employee, Robertson (Record 47); as then weighing 625 to 750 pounds each (Record 48); as being good quality (Record 59); as being "under contract" (Record 47, 55). The difference between contract price and market value at time of delivery, namely 7½ cents a pound, was shown (Record 29 and 87); their average weight at time of delivery was established (Record 51, Exhibits 3, 5, 6, Record 41, 67, 68). With damages per pound and weight at time of delivery thus established, appellee's damages then became but a matter of mathematical computation.

We submit, accordingly, that each and every element essential to appellee's right of recovery was well established by appellee's evidence, and the appellant's motion to dismiss was properly denied.

VIII

Appellant did not receive a fair trial.

This, without question, is the most serious charge embodied in appellant's brief, directed as it is toward the conduct of a trial presided over by a member of this court. Its seriousness necessitates more than mere passing comment, reflecting, as it does, upon the judicial integrity of Judge Healy.

An examination of appellant's argument under this point indicates that the charge of unfairness springs from two contentions (a) that the trial judge discounted the credibility of appellant as a witness, and (b) that the court adopted a wrong theory of the case.

As to the first we cannot, as we have hereinbefore observed, attempt to detail the factors that entered into the trial court's conclusion that appellant himself was not being fair and honest in his testimony. Obviously, his appearance and demeanor on the witness stand made its influence felt. His self contradictions undoubtedly were important. In his pretrial deposition he denied using the O left hip brand for several years, specifically denying that he used it in 1944, 1945 or 1946 (Record 108). Yet it was conclusively proven at the trial that at the very time he signed the contract he had O left hip cattle and had himself so branded them. He attempted to excuse his non-delivery upon the grounds that he didn't have the steers, and couldn't get them. Yet it was conclusively shown that he had O left hip steers,

and he was "stalling" in his effort to acquire others. He attempted to make the court believe that he offered to fill the contract, but the evidence showed all he did was to attempt to gouge a price of 19 cents for some undetermined number, whereas his contract was for 300 head at 17½ cents. And also he solemnly testified under oath that when appellee demanded delivery, and he was unable to deliver, he stated to Salerno:

> " 'I will go to Denver and buy you 300 steers and sell them to you for 17½ cents" and he (Salerno) said, 'What kind of steers,' and I said, 'Steers as called for in the contract and will sell them for 17½' " (Record 158).

This conversation was, of course, denied by Salerno, (Record 140), but the point is, he was endeavoring to induce the court to believe that he offered to give appellee just what the contract called for at the contract price of 17½ cents, and that appellee refused to receive it. Small wonder the trial court was skeptical of his truthfulness. Certainly, in the light of his self-contradictions it cannot be said that the trial court was unfair in declining to accept his uncorroborated testimony, and finding the facts contrary thereto and in accordance with corroborated documentary evidence.

As to his contention that the court adopted the wrong theory, the only theory the trial court adopted was that the evidence was sufficient to show a right of recovery in the appellee, and it accordingly so found and concluded.

He says the trial court should have permitted him to prove that when the contract was signed he didn't have the O left hip steers, and his recital in the contract that he did was a mistake (Record 141, 142). It would seem that in the light of the conclusive evidence that he did have the O left hip steers, the court was doing him a favor in protecting him from the opportunity of perjuring himself, but further than that, as the court ruled, mistake in the contract was not pleaded as a defense, and was not an issue. To prove that he didn't have the steers, when his agreement recited that he did, was to vary the writing, and properly inadmissable in the absence of a pleading raising the issue of mistake.

He says the trial court erred in not permitting him to state *why* he didn't buy steers for appellee "under any contract" in late November, 1946 (Record 155). This was three or four weeks after the contract was signed, and further the question did not relate to this contract, but to "any contract." The issues were whether there was a valid contract, and, if so, why he didn't deliver? The question on its face called for an immaterial answer.

Such, therefore, is the basis for the charge that appellant was not given a fair trial. We submit that it is entirely unfounded, both in fact and in law.

CONCLUSION

We submit the judgment of the trial court should be affirmed. Every fact found is well supported by the evidence. Most of the evidence supporting the findings is without contradiction.

Appellee affirmatively proved the execution and delivery of the contract; it identified the specific steers covered thereby; it established their quality as good quality; it proved with reasonable certainty what those steers would have weighed at time of delivery; and it proved the market value of steers of that type at the time delivery should have been made. Thus, the amount of the judgment became but a mathematical calculation, namely, difference between contract price of 17½ cents a pound and market value, at the time fixed for delivery, of 25 cents a pound, or 7½ cents, multiplied by the total weight at the time of delivery. Appellee's right of recovery in the amount of the judgment rendered by the trial court was thus established.

Appellant's evidence did not defeat the right so established. He contended the contract was delivered conditionally, and was not to take effect until (a) the shrinkage provision was eliminated, and (b) until he obtained the steers which were the subject of the contract. As to the shrinkage matter, his first letter (November 3, 1946) was that he "would like" the 3% shrinkage eliminated. His second letter (November 12, 1946) suggested that it be cut from 3% to 1½%. Thereafter he at all times, as evidenced by his subsequent letters (October 22nd and October 28th) treated the contract as in full force and effect.

As to the asserted condition that the contract was not to be in effect until he had the steers, the evidence conclusively showed that he had them at the time the contract was signed. Obviously, this then could not have been a condition to delivery.

He asserts the contract never became effective because he never received the $3,000.00 initial payment. We have shown by the letter through which he attempted to return the $3,000.00, some nine months after he received it (Exhibit 8), that he acknowledged the $3,000.00 he so received was paid him under this contract. Further, his conduct in regarding the contract as valid and subsisting as late as when he was called upon to make delivery would constitute a waiver, insofar as the earlier payment of the $3,000.00 was concerned, if originally it was not paid strictly on time.

His assertions of mutual abandonment and offers to perform require no further comment. On every matter of defense raised, there was at most but a conflict in the evidence, and very little of that, and each and every finding of the trial court is amply supported by the evidence.

The judgment should be affirmed.

Respectfully submitted,

NEIL R. OLMSTEAD

O. R. BAUM

BEN R. PETERSON

Attorneys for Appellee.